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14  
15 IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

16  
17 United States of America ex rel. Masoud ) No. CV 05-124-LDW  
Samandi, )  
18 Plaintiffs, )  
19 vs. )  
20 Materials and Electrochemical Research ) NOTICE AND MEMORANDUM IN  
Corporation, et al., ) SUPPORT OF PLAINTIFF SAMANDI'S  
Defendants. ) MOTION TO REOPEN AND RESTORE  
THE ACTION

1 Plaintiff-Relator Samandi (“Plaintiff”) files this written notice and respectfully  
2 moves pursuant to this Court’s order filed January 4, 2011, ECF document #280, (the  
3 “Order”) to reopen this matter and restore it to the Court’s docket.

4 Background

5 The Order granted Plaintiff’s motion to voluntarily dismiss all of his claims  
6 against each of the Defendants named in the qui tam complaint in this action without  
7 prejudice, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii).

8 Additionally, the Order provided that after the claims in the Government’s  
9 complaint in the matter were finally resolved or adjudicated through a final and  
10 unappealable determination, the parties to the qui tam complaint were to engage in good  
11 faith efforts to settle or mediate any unresolved claims in the qui tam complaint.

12 The Order further provided that if the parties to the qui tam complaint were unable  
13 to resolve any of the unresolved claims in the qui tam complaint, either by way of  
14 settlement or mediation, Plaintiff could reopen the matter by filing a notice to restore it  
15 with the Court, in which case his rights were to be fully preserved as they existed at the  
16 time Defendants and/or their representative executed the stipulation of dismissal without  
17 prejudice filed in connection with Plaintiff’s Rule 41(a)(1)(A)(ii) motion to dismiss.

18 Grounds for Reopening and Restoring Case

19 1. The claims in the Government’s complaint in the matter have now been  
20 finally resolved.

21 On February 16, 2011, a jury empanelled in the District of Arizona returned a  
22 verdict in favor of the Defendants on all claims in the Government’s complaint. On  
23 August 29, 2011, the Court denied the Government’s motion for a new trial. And, on  
24 February 13, 2012, the Government voluntarily withdrew and terminated an appeal it had  
25 commenced in the United States Court of Appeals for the Ninth Circuit.

1           2. There are claims in the qui tam complaint that were not resolved by the trial  
2 of the Government's complaint.

3           The qui tam complaint is readily distinguishable from that of the United States in  
4 terms of the named defendants, alleged misconduct, affected governmental agency and  
5 theories of liability. The Government's complaint named only three defendants:  
6 Materials & Electrochemical Research Corp. ("MER") and its co-owners, James Withers  
7 ("Withers") and Raouf Loutfy ("Loutfy"). It alleged that these three defendants violated  
8 Sections 3729(a)(1), (a)(1)(B) and (a)(3) of the False Claims Act ("FCA"), 31 U.S.C. §§  
9 3729 et seq., in connection with a total of eight proposals for Small Business Innovation  
10 Research ("SBIR") funding that MER submitted to the National Aeronautics & Space  
11 Administration ("NASA") and/or the Department of Energy ("DOE").<sup>1</sup> These eight  
12 proposals were identified by their agency contract numbers as follows:

13           NAS5-02025  
14

15           NAS5-02123 [allegations as to SWIP only; not re Kowbel PhD]  
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17           NAS5-0233  
18

19           NAS8-00199  
20

21           DE-FG03-98ER-82614 [allegations as to SWIP only; not re Kowbel PhD]  
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23           DE-FG03-99ER-82823  
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25           DE-FG03-00ER-83043  
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<sup>1</sup> The Government's complaint also sought liability on common law claims of breach of contract, payment by mistake, unjust enrichment, recoupment, and negligent misrepresentation. The Court, however, permitted the jury to consider only the common law claim for breach of contract.

1 DE-FG03-01ER-83279<sup>2</sup>

2 According to the Government's complaint, NASA and DOE awarded MER an aggregate  
 3 amount of \$5,066,027 in SBIR funding based on the eight proposals it had identified.

4 At trial the Government presented two distinct theories of FCA liability. Its  
 5 principal focus was on the representations MER, Withers and/or Loutfy made to NASA  
 6 and/or DOE concerning MER's purported third-party funding in the form of venture  
 7 capital commitments submitted during the grant application process on behalf of an  
 8 ostensibly separate entity called Southwest Investment Partners ("SWIP"). The United  
 9 States alleged and sought to prove that these SWIP venture capital commitments were  
 10 materially false in three respects: (1) signatures on the commitment documents by one of  
 11 SWIP's supposed partners (designated as "Harvie Weber") were, in fact, penned by MER  
 12 employees and not Harvie Weber, who, in fact, was unaware that her name was being  
 13 signed on the SWIP commitments; (2) "Harvie Weber" (who was legally known as  
 14 Marlene Weber) was not even a partner of SWIP and had no knowledge of, or  
 15 participation in, SWIP's operations, finances or activities; and (3) SWIP was actually  
 16 MER in disguise and therefore SWIP was not a genuine third-party funding source (and  
 17 moreover, did not even have the resources to make good on its financing commitments if  
 18 called upon to do so). As discussed later in this memorandum, the qui tam complaint  
 19 contains no allegations concerning misconduct involving SWIP.

20 The United States also alleged and presented evidence that six of the eight  
 21 proposals at issue in the trial contained materially false representations concerning a  
 22 single aspect of the professional credentials for one of MER's scientists, namely, Witold  
 23

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25 <sup>2</sup> The eight proposals at issue were designated at trial as USX 37, 38, 40, 41, 61, 62, 63  
 26 and, 64.

1 Kowbel.<sup>3</sup> Specifically, the Government claimed and sought to establish that the SBIR  
 2 proposals at issue represented that Kowbel, who was to play a significant role in the  
 3 research to which the grants were directed, had a Ph.D. in chemistry from a Polish  
 4 university, when, in fact, he did not, and further, that the MER, Withers and Loutfy  
 5 knowingly submitted (or caused the submission of) these false SBIR proposals to NASA  
 6 and/or DOE.

7       The jury found for MER, Withers and Loutfy, and against the United States, on  
 8 both theories of liability, as applicable, with respect to the eight SBIR proposals at issue.  
 9 The verdict was general; there were no specific findings. See ECF Docket Document #  
 10 312. Questions left open by the jury verdict included, whether the Government had failed  
 11 to adequately establish the elements of the alleged FCA violations or whether the jury  
 12 accepted the Government-named defendants “good faith” affirmative defenses to the  
 13 specified allegations against them.

14       While there is some overlap between them, the qui tam complaint contrasts  
 15 sharply with the Government complaint. For starters, the qui tam complaint names Roger  
 16 Storm and Witold Kowbel as defendants, while the Government complaint did not.  
 17 Secondly, the qui tam complaint alleges FCA violations in connection with SBIR  
 18 proposals submitted to, and/or contracts entered into with, the United States Army,  
 19 United States Marines and United States Department of Defense (DOD), while the  
 20 Government’s trial did not involve any of these agencies. In fact, pre-trial the Court  
 21 granted the Government’s motion to voluntarily dismiss its DOD-related claims without  
 22 prejudice.

23       Thirdly, the qui tam complaint alleges different theories of liability. For example,  
 24 it alleges that Defendants Storm, MER, Withers and Loutfy submitted duplicative

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25       <sup>3</sup> The six Kowbel-related subset of proposals at issue were designated at trial as USX 37,  
 26 40, 41, 62, 63 and, 64.

1 research reports on SBIR contracts (not grant proposals) to different Government  
 2 agencies and got paid by each agency as though the work had been done independently,  
 3 i.e., MER got paid twice for the same research. Similarly, the qui tam complaint alleges  
 4 that Defendants MER, Withers and Loutfy submitted two research reports for SBIR  
 5 contracts (again, not proposals) that plagiarized the results of published graduated student  
 6 theses and falsely presented such results as those of MER's lab. The complaint also  
 7 alleges that Defendants MER, Withers and Loutfy submitted SBIR grant proposals which  
 8 falsely represented MER's success in commercializing a compound known as  
 9 fullerenes/Nanotubes. None of these theories of liability was even remotely at issue in  
 10 the Government's trial.

11 In addition, the qui tam complaint alleges that Defendants Kowbel, MER, Withers  
 12 and Loutfy submitted proposals to the Army and DOD, as well as to NASA and DOE, in  
 13 connection with 20 SBIR grant applications, totaling \$8,534,681, which proposals falsely  
 14 represented that Kowbel not only had obtained a Ph.D. in chemistry from a Polish  
 15 university, when he had not, but also falsely represented that he had been a tenured  
 16 associate professor at Auburn University and had been an employee of NASA, when he  
 17 in fact had not been employed in either of these capacities. Thus, this claim of liability  
 18 involving Kowbel's embellished professional credentials differs from the Government's  
 19 by: naming Kowbel as a defendant; citing Army and DOD agencies as victims of  
 20 Defendants' FCA violations; and by alleging that the proposals were materially false  
 21 because Kowbel lied about his employment at Auburn University and NASA, in addition  
 22 to lying about having obtained a Ph.D. in chemistry from a Polish university. This aspect  
 23 of the qui tam complaint also implicates 14 NASA and/or DOE SBIR contracts that were  
 24 never the subject of the Government's trial, as noted in the following chart.

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1           The chart below summarizes the qui tam claims by category, showing the affected  
 2 government agency, contract designation (with an asterisk in the Claim D category where  
 3 the contract was at issue in the Government trial), year and value:

4           **A. Duplicative Tech Rpt Results (2 Contracts at Issue)**

	<b>Agency</b>	<b>Contract No.</b>	<b>Year</b>	<b>Amount</b>
<b>1</b>	Army	DAAH10-03-C-0016	2003	[\$730,000] <sup>4</sup>
<b>2</b>	Marines	M67854-03-C0039	2002	\$99,994
	Marines	M67854-03-C0039	2003	<u>\$600,000</u>
<b>Total</b>				<b>\$699,994</b>

9           **B. Plagiarized Theses (2 Contracts at Issue)**

<b>1</b>	DOE	DE-FG03-98ER82614	1999	\$750,000
<b>2</b>	DOE	FG03-00ER83043	2001	<u>\$750,000</u>
<b>Total</b>				<b>\$1,500,000</b>

13           **C. Overstated Commercialization: Fullerenes/Nanotubes (3 Contracts at**  
 14           **Issue)**

<b>1</b>	DOE	DE-FG03-00ER83042	2000	\$100,000
<b>2</b>	DOE	DE-FG03-00ER83042	2001	\$600,000
<b>3</b>	DOE	DE-FG03-01ER83281	2002	<u>\$750,000</u>
<b>Total</b>				<b>\$1,450,00</b>

19           **D. Embellished Kowbel credentials (20 Contracts at Issue)**

<b>1</b>	DOE	DE-FG03-01ER83279*	2002	\$750,000
<b>2</b>	NASA	NAS5-02025*	2002	\$599,950
<b>3</b>	NASA	NAS5-00233*	2001	\$600,000
<b>4</b>	Army	DAAD19-02-C-0020	2001	\$729,763
<b>5</b>	NASA	NAS1-00059	2000	\$600,000
<b>6</b>	NASA	NAS5-00233*	2001	\$70,000

25           <sup>4</sup> For damages and fines purposes, this analysis uses the Marines “AAAV” contract value  
 26 and not the Army “Face Gear” contract value, as the duplicative amount.

1	<b>7</b>	NASA	NAS8-02038	2002	\$600,000
2	<b>8</b>	NASA	NAS1 99040	1999	\$70,000
3	<b>9</b>	DoD-MDA	DASG60-01-P-0087	2001	\$64,999
4	<b>10</b>	DoD-MDA	DASG60-02-P-0169	2002	\$70,000
5	<b>11</b>	DoD-AF	F33615-03-M-5030	2003	\$100,000
6	<b>12</b>	DoD-AF	FA9451-04-M-0157	2004	\$100,000
7	<b>13</b>	DoD-MDA	W9113M-04-P-0127	2004	\$100,000
8	<b>14</b>	NASA	NNL05AA78P	2005	\$70,000
9	<b>15</b>	Army	W9113M-06-C-0005	2005	\$730,000
10	<b>16</b>	DoD-AF	FA8650-07-C-5212	2007	\$749,969
11	<b>17</b>	Army	W911W6-08-C-0065	2008	\$730,000
12	<b>18</b>	NASA	NAS8-00199 (90212)*	2001	\$600,000
13	<b>19</b>	DOE	DE-FG03-99- ER82823*	2000	\$750,000
14	<b>20</b>	DoD-AF	F-33615-98-C-5057	1998	<u>\$450,000</u>
15	<b>Total</b>				<b>\$8,534,681</b>

3. The parties to the qui tam complaint have been unable to settle or mediate the unresolved claims in the qui tam complaint.

After the Government withdrew its appeal from the Ninth Circuit, counsel for Samandi spoke with counsel of record for Defendants to discuss a possible settlement of the unresolved claims. Subsequently, at defense counsel's request, Samandi provided a specific, written settlement demand. Samandi's initial offer represented a small fraction of Defendants' economic exposure to the unresolved claims in the qui tam complaint.

In response to this overture, newly retained counsel for Defendants sent a letter dated April 26, 2012 to Plaintiff's counsel advising that Defendants would not pay a single penny to settle the unresolved qui tam claims. In his letter, counsel for Defendants further threatened to seek economic sanctions against Plaintiff or his counsel if Plaintiff sought to abide by the Order's provision for restoring the action upon written notice to the Court. He wrote, "[I]f you should seek to press Mr. Samandi's claims on behalf of the Government, we will seek appropriate remedies, including attorneys' fees. *See* 31 U.S.C. § 3730(d)(4), 28 U.S.C. § 1927 and Rule 11 of the FRCP." Apparently, this represented

1 Defendants' first and final "good faith effort[] to settle or mediate any unresolved claims  
2 in the qui tam complaint," as mandated by the Order.

3 As a result of Defendants refusal to even discuss a possible settlement of the  
4 unresolved FCA claims, Plaintiff has no choice but to apply to have this action reopened  
5 and restored to the Court's docket, with his rights fully preserved, as provided for in the  
6 Order.

7 Conclusion

8 For all of the foregoing reasons, Plaintiff's motion to reopen and restore this action  
9 should be granted.

10 Dated this 27 day of May, 2012

11 Respectfully submitted,  
12 /s/ Timothy J. McInnis

13 \_\_\_\_\_  
14 Timothy J. McInnis  
15 Attorney for Plaintiff Samandi  
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## CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2012, I electronically transmitted the within and foregoing Plaintiff's **MOTION TO REOPEN AND RESTORE THE ACTION** to the Clerk's Office using the CM/ECF System for filing and thereby caused transmittal of a Notice of Electronic Filing to all counsel of record who are CM/ECF registrants in this matter.

I also concurrently sent a copy of the within motion by email to:

Michael J. Rusing  
mrusing@rllaz.com

Dated this 27 day of May, 2012

/s/ Timothy J. McInnis

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Timothy J. McInnis  
Attorney for Plaintiff Samandi